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Case Number 463,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RIJU RAVINDRAN, BYJU'S ALPHA, INC and TANGIBLE PLAY, INC.,	)	
Defendants Below, Appellants,	)	No. 463, 2023
v.	)	
GLAS TRUST COMPANY LLC, in its capacity as Administrative Agent and Collateral Agent, and TIMOTHY R. POHL,	)	Court Below: Court of Chancery C.A. No. 2023-0488-MTZ
Plaintiffs Below, Appellees.	)	

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This appeal stems from the misguided efforts of Defendants-Appellants BYJU's Alpha, Inc., Riju Ravindran, and Tangible Play, Inc. ("Defendants") to contest the consequences of their numerous uncured defaults under a $1.2 billion loan facility. After a majority of lenders directed Plaintiff-Appellee GLAS Trust Company LLC ("GLAS") to exercise remedies on their behalf, GLAS took control of BYJU's Alpha and reconstituted its board, appointing Plaintiff-Appellee Timothy Pohl to the company's sole director position. Pohl, in turn, appointed himself as BYJU's Alpha's sole officer. Together, GLAS and Pohl then filed suit in the Court of Chancery pursuant to 8 *Del. C.* §225, each independently seeking a declaration affirming Pohl's appointment as BYJU's Alpha's sole director and officer.

The Court of Chancery granted GLAS and Pohl's requested relief. The court first held that, regardless of GLAS's right to sue in Delaware under a forum selection provision in the loan agreement, Defendants waived any argument that the provision prevented Pohl (a nonsignatory to the agreement) from doing so. The court next concluded that Defendants' failure to comply with various requirements under the agreement constituted at least one "Event of Default," thus entitling GLAS to exercise remedies culminating in Pohl's appointment as BYJU's Alpha's sole director and officer. These determinations are plainly correct, and Defendants have provided no basis for reversal. This Court should affirm.

SUMMARY OF ARGUMENT

I. Denied. The Court of Chancery correctly determined that Defendants waived an argument that Pohl, a nonsignatory to the loan agreement, was bound by that agreement's forum selection provision. Defendants did not address this issue in any briefing below, even though Plaintiffs raised it at the outset of the case. At trial, Defendants likewise focused on a different issue and strategically declined to engage with this issue. Even if the Court of Chancery's finding were erroneous, Defendants have not demonstrated the requisite plain error to obtain reversal. The forum selection provision does not require this suit to be brought in New York, Pohl is not bound by the provision because he is a nonsignatory, and this suit's outcome would not change in New York given Defendants' repeated admissions of default.

II. Denied. The Court of Chancery correctly determined that the failure of an affiliate of BYJU's Alpha to accede as a guarantor under the loan agreement constituted a material breach of the agreement entitling GLAS to enforce remedies. Defendants conceded in the loan agreement's amendments that this non-performance constituted default entitling GLAS to exercise remedies. The amendments corroborated the agreement's plain language, under which the loan parties covenanted that the affiliated party would accede as a guarantor, and allocated to themselves the risk of default for non-performance. The agreement did not merely require the loan parties to undertake reasonable commercial efforts to

obtain the regulatory approval necessary for the guarantee. The breach was not trivial, and enforcement is not unconscionable.

III. Denied. The Court of Chancery correctly determined that Defendants' non-performance of the guarantee covenant should not be excused due to impossibility. Defendants' argument cannot be squared with their prior concessions in the agreement's amendments. Regardless, the rarely-imposed impossibility doctrine is available only if there was an unanticipated event that could not have been foreseen or guarded against in the contract. Here, three months before the loan agreement was executed, the Indian government proposed regulations that no longer included a regulatory exception important to satisfying the guarantee covenant. The parties nevertheless allocated to Defendants the risk that regulatory approval might not come in time, or at all. The parties set an unqualified deadline for Whitehat's guarantee, thus placing on Defendants the risk of noncompliance, irrespective of the cause. Defendants' contrary arguments are uniformly meritless.

IV. Even if the Court of Chancery erred with respect to the guarantee covenant, its judgment should be affirmed given numerous other defaults, specifically, the loan parties' repeated failure to provide required audited and unaudited financial statements. Defendants have conceded that this non-performance constitutes default entitling GLAS to enforce remedies, and their defenses to their admitted defaults are unavailing.

STATEMENT OF FACTS

A. The Credit Agreement

1. Defendant-Appellant BYJU's Alpha, Inc. ("BYJU's Alpha") is a wholly-owned Delaware subsidiary of Think and Learn Private Limited ("T&L"), a company founded by Byju Ravindran and organized under Indian law. Op.4.[1] On November 24, 2021, BYJU's Alpha and its guarantors, including T&L (the "Loan Parties") entered into a credit and guaranty agreement (the "Credit Agreement") to govern the terms of a loan facility providing $1.2 billion to BYJU's Alpha. Op.5. The counterparties were GLAS, in its capacity as administrative and collateral agent, and (following the loan's syndication) nearly forty other lenders (the "Lenders"). Op.5.

Befitting a $1.2 billion loan facility negotiated by sophisticated parties, the Credit Agreement imposes numerous obligations upon the Loan Parties, and it gives the Lenders and GLAS robust enforcement rights. Article V, titled "Affirmative Covenants," sets forth certain of the Loan Parties' obligations. One such covenant requires T&L to provide to GLAS at specified intervals (1) annual audited financial statements and (2) quarterly unaudited financial statements. Op.9; A148-49 (§5.1(a)-(b)). Another covenant requires Whitehat Education Technology Private

[1] In this brief, "Op." refers to the opinion of the Court of Chancery, attached as Exhibit B to Defendants' Opening Brief ("Br."); "A" refers to Defendants' Appendix; and "B" refers to Plaintiffs' Supplemental Appendix.

Ltd. ("Whitehat India" or "Whitehat")—an Indian-organized T&L subsidiary that T&L had recently purchased for $300 million—to accede to the Agreement as a guarantor. Op.5; A153 (§5.9(c)).

At the time the Loan Parties executed the Credit Agreement, Indian regulations provided that Indian entities seeking to guarantee foreign loans needed to obtain consent from the Reserve Bank of India ("RBI") if (1) the guaranteed amount exceeded $1 billion (the "Amount Test"); or (2) the guaranteed amount exceeded 400% of the guarantor's net worth (the "Net Worth Test"). Under those regulations, pursuant to what was known as the "Borrowing Exception," subsidiaries could rely on their parent's net worth to satisfy the "Net Worth Test." Op.6. Three months before the Agreement's execution, however, the RBI published proposed revisions to the regulations that did not maintain the Borrowing Exception. Op.10.

The Credit Agreement's loan amount exceeded $1 billion and exceeded 400% of Whitehat's net worth, triggering the RBI consent requirement for Whitehat to serve as guarantor. Op.6. But Whitehat was unable to obtain RBI's consent before the Agreement's execution in November 2021. Op.6. Because Whitehat's guarantee was non-negotiable for the Lenders, the parties agreed to a compromise: Whitehat did not have to guarantee the loans by the Credit Agreement's execution date, but it *had* to issue a guarantee by April 1, 2022, irrespective of approval by RBI. Op.6. Accordingly, the parties added the following covenant to the Agreement: "On and

from the earlier of (i) April 1, 2022 and (ii) within five Business Days of the date RBI Approval is received, Whitehat India shall accede to this Agreement … as a Guarantor." Op.6; A153 (§5.9(c)); *see also* A138 (§3.3) (acknowledging that a condition to Defendants' satisfaction of their obligations was the "receipt of the RBI Approval for … Whitehat India to issue a guarantee … prior to 1 April 2022"). The Credit Agreement required T&L to "use its reasonable commercial efforts to procure [Whitehat India's] RBI approval on or prior to April 1, 2022 in order that [T&L] and Whitehat India may guarantee" the loans. Op.7; A157 (§5.17(d)).

2. The Credit Agreement identifies "Events of Default" and consequences for default. Under Section 8.1(e), an "Event of Default" "shall occur" if:

> [A]ny Loan Party shall fail to observe or perform any covenant, condition or agreement contained in any of the Loan Documents … , and such failure shall continue unremedied for a period of 45 days after notice thereof from [GLAS] to [BYJU's Alpha] (which notice will be given at the request of any Lender).

Op.8; A180 (§8.1(e)). If an Event of Default occurs, and Lenders holding at least 50% of the outstanding loans request that GLAS enforce the Event of Default, GLAS must take "any or all of the following actions" after providing notice (a "Default Notice") to BYJU's Alpha: "(i) enforce any and all Liens and security interests created pursuant to the Collateral Documents in addition to any other remedies available under the Loan Documents or applicable law," and "(ii) declare the Term Loans then-outstanding to be due and payable in whole." Op.8; A183 (§8.1).

GLAS and BYJU's Alpha's direct parent also entered into a Pledge Agreement and a Security Agreement. The Pledge Agreement pledges 100% of BYJU's Alpha's common stock as collateral for the term loans. Op.8-9. It entitles GLAS to take control of those shares upon a "Trigger Event," which includes service of a Default Notice under the Credit Agreement. Op.9; B40 (§1.3); *see also* B47, B49, B50-52 (§§4.4(c)(ii)(A), 6.1(a)(vi), 7.1). The Security Agreement similarly provides that if GLAS delivers a Default Notice under the Credit Agreement, GLAS obtains power of attorney "to exercise any of the rights conferred on [GLAS] in relation to the Collateral Assets or under any Loan Document or under any law." Op.9; B18 (§19.1(b)).

B. The Conceded Defaults Under the Credit Agreement, and GLAS's Enforcement of Remedies

Within months of executing the Credit Agreement and receiving over $1 billion, BYJU's Alpha and its affiliates began breaching the Agreement. At least four distinct breaches occurred:

- By March 16, 2022, T&L was required to, but did not, provide (i) unaudited consolidated financial statements for fiscal-year 2020-21 third quarter and the then-elapsed portion of fiscal-year 2020-21, plus (ii) comparative figures for the prior fiscal year. A149 (§5.1(b)).
- By September 13, 2022, T&L was required to, but did not, provide (i) unaudited consolidated financial statements for fiscal-year 2022-23 first quarter, plus (ii) comparative figures for the prior fiscal year. A149 (§5.1(b)).

- By September 27, 2022, T&L was required to, but did not, provide its annual audited financial statements for fiscal-year 2021-22, without a "going concern" qualification. A148 (§5.1(a)).

- By April 1, 2022, Whitehat was required to, but did not, accede as a guarantor. A153 (§5.9(c)). On April 5, the Loan Parties executed a limited waiver extending Whitehat's deadline until October 8, 2022. By October 8, Whitehat still had not acceded as a guarantor.

See Op.10-11.

On October 12, 2022, on the heels of those defaults, the Loan Parties executed the Second Amendment to the Credit Agreement. Op.11. The Second Amendment modified the Credit Agreement to add a new term, "Specified Defaults," defined as T&L's failure to provide the financial statements and Whitehat's failure to accede as a guarantor to the Agreement, as described above. Op.11-12; B69 (§1(a)). The Second Amendment also provided that the Specified Defaults would have a 45-day cure period expiring on November 24, 2022, at which point any uncured Specified Default would mature into an Event of Default permitting GLAS to enforce remedies. Op.12; B70 (§1(c)).

November 24 came and went, and none of the Specified Defaults had been cured, causing them to become Events of Default. Op.12. With the Lenders hopeful that an amicable resolution was still possible, the parties executed the Third Amendment to the Credit Agreement. Op.12. In the Third Amendment, (a) T&L and BYJU's Alpha "acknowledged and agreed" that the Specified Defaults had not been cured; (b) they admitted that the Lenders were "therefore entitled" to deliver to

BYJU's Alpha, through GLAS, a "notice of default and acceleration with respect to the Specified Defaults"; and (c) the Lenders nevertheless agreed not to send that notice or commence enforcement through December 2, 2022. Op.12; B120-21 (Recitals §1(a)-(b)).

The Lenders continued their negotiation efforts into the new year, culminating in the Seventh Amendment to the Credit Agreement on January 6, 2023. The Seventh Amendment gave BYJU's Alpha yet *more* time before the Lenders would seek enforcement—this time, through February 10. But the Loan Parties made significant concessions, agreeing that (1) "none of the Specified Defaults can be cured … until specifically waived" by the Lenders; (2) their obligations under the Credit Agreement are "enforceable and non-avoidable obligations"; (3) "no Default or Event of Default has occurred … *other than the Specified Defaults*"; and (4) the failure to cure the Specified Defaults "entitles" the Lenders to exercise remedies. Op.12-13; B146, B151, B156, B161 (Recitals, §§3(b)(ii), 5(h), 8(d)) (emphasis added).

The Lenders' patience finally ran out. On March 3, 2023, Lenders holding over 50% of the loans directed GLAS to deliver to BYJU's Alpha a Default Notice identifying the four outstanding Events of Default and accelerating the outstanding loans. Op.13; A1555; B169. GLAS then undertook a series of actions pursuant to its contractual rights. First, by operation of the Pledge Agreement and Security

Agreement—under which, as noted, a Default Notice's delivery was a "Trigger Event"—GLAS took control of all of BYJU's Alpha's stock. Op.13. Second, GLAS, as sole stockholder, amended BYJU's Alpha's bylaws to give stockholders the power to fill vacant board seats. Op.13. Third, GLAS, as sole stockholder, removed Riju Ravindran (Byju's brother) as BYJU's Alpha's sole director and appointed Timothy Pohl in his place. Op.13-14. As sole director, Pohl then removed the company's sole officer (Riju Ravindran) and appointed himself CEO. Op.14.

C. Proceedings Below

In response, Byju and Riju Ravindran and their affiliated entities denied that any Events of Default took place, contrary to their prior concessions. A690-91 (¶¶55-56). Given the resulting dispute over corporate control, on May 3, 2023, GLAS and Pohl filed a complaint in the Court of Chancery against BYJU's Alpha, Riju Ravindran, and Tangible Play, Inc. (a guarantor under the Credit Agreement) seeking a declaration under 8 *Del. C.* §225 affirming Pohl's appointment as BYJU's Alpha's sole director and officer. Op.14. GLAS and Pohl sought expedition and a *status quo* order; the Court of Chancery granted both after a hearing. A627-1195. On June 5, 2023, before responding to GLAS and Pohl's complaint, BYJU's Alpha's former affiliates filed suit against GLAS in New York state court. *See BYJU's Pte. Ltd. v. GLAS Tr. Co. LLC*, Index No. 652717/2023 (Sup. Ct., N.Y. Cnty.). On August 4, 2023, the Court of Chancery held a one-day trial on the merits.

On November 2, 2023, the Court of Chancery ruled for GLAS and Pohl, concluding that "Pohl is, indeed, BYJU's Alpha's sole director and officer." Op.4. At the outset, the court rejected Defendants' argument that it could not entertain the case given the Credit Agreement's forum selection provision. Observing that Pohl is "a nonsignatory" to the Credit Agreement, it held that Defendants had not sufficiently argued that Pohl is bound by the forum selection clause, and thus Defendants waived any such contention. Op.15-16. Accordingly, the court did not address GLAS's ability to bring suit in Delaware. Op.16.

The court next concluded that Whitehat's failure to accede as a guarantor constituted an Event of Default, entitling GLAS to deliver the Default Notice triggering GLAS's and Pohl's actions, which themselves were uncontested. Op.16-17, 22-30; *see also* Op.17 ("There is no dispute as to the mechanics of the removal of BYJU's Alpha's former director and officer and Pohl's appointment."). The court noted that "[i]t is undisputed that Whitehat … has not acceded as a guarantor." Op.20. The court rejected Defendants' argument that the Credit Agreement merely required T&L to use "commercially reasonable efforts" to obtain Whitehat's guarantee. The court also noted that the Second Amendment and Seventh Amendment "made clear that Whitehat's failure to accede was an event of default" that "gave GLAS the right to send to BYJU's Alpha a default notice." Op.28-29.

Finally, the Court of Chancery rejected Defendants' argument that Whitehat's failure to accede as a guarantor should be excused due to impossibility. The court concluded that when the parties executed the Credit Agreement, it was reasonably foreseeable that the Indian government would discontinue the Borrowing Exception before Whitehat could obtain RBI approval, because proposed regulations published before the Agreement's execution did not include the Borrowing Exception. Op.31-35. The parties could have allocated the risk of an RBI denial to the Lenders, but they did not. Op.35. Indeed, after Defendants defaulted and the RBI eliminated the Borrowing Exception, "the risk shifted from foreseeable to known," yet the parties "*continued* to allocate that risk to" Defendants. *Id.* (emphasis added).

Because the court held that Whitehat's failure to accede as a guarantor constituted an Event of Default (thereby allowing GLAS to exercise remedies culminating in Pohl's appointment as BYJU's Alpha's sole director and officer), it did not address the three other conceded defaults regarding the financial statements. Op.17. The court entered final judgment on November 13, 2023, and Defendants appealed.[2]

[2] After the court issued final judgment, BYJU's Alpha, under Pohl's direction, filed a Chapter 11 petition in the United States Bankruptcy Court for the District of Delaware. *See In re BYJU's Alpha, Inc.*, No. 24-10140 (Bankr. D. Del. Feb. 1, 2024). Per the parties' subsequent stipulation, the bankruptcy court lifted the automatic stay to allow this appeal to proceed. *See id.* Dkt. Nos. 103, 105.

ARGUMENT

I. THE COURT OF CHANCERY DID NOT PLAINLY ERR IN FINDING THAT DEFENDANTS WAIVED AN ARGUMENT THAT THE FORUM SELECTION PROVISION APPLIES TO POHL.

A. Question Presented

Whether the Court of Chancery plainly erred in finding that Defendants waived an argument that the Credit Agreement's forum selection provision binds Pohl, a nonsignatory to the Agreement. A1459-62.

B. Scope of Review

This Court "reviews a trial court's finding of waiver under the standard of plain error." *N. Am. Leasing, Inc. v. NASDI Hldgs., LLC*, 276 A.3d 463, 470 (Del. 2022). For the Court to find plain error, "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Med. Ctr. of Del., Inc. v. Lougheed*, 661 A.2d 1055, 1060 (Del. 1995). "[T]he doctrine of plain error is limited to material defects" that "are basic, serious and fundamental in their character." *Robertson v. State*, 596 A.2d 1345, 1356 (Del. 1991).

C. Merits of Argument

The Court of Chancery correctly found that Defendants waived an argument that Pohl, a nonsignatory to the Credit Agreement, is bound by the Agreement's forum selection provision. And even if that finding were incorrect, any error was

not so "clearly prejudicial" to Defendants' "substantial rights" that reversal is required. *Lougheed*, 661 A.2d at 1060.

1. The Court of Chancery Correctly Found that Defendants Waived An Argument that the Forum Selection Provision Applies to Pohl.

The Court of Chancery found that Pohl is "a nonsignatory" to the Credit Agreement and that Defendants' "pretrial brief did not address whether Pohl is bound by the credit agreement's forum selection clause as such." Op.16. Accordingly, the court concluded, "[a]ny such argument is therefore waived." Op.16; *see also id.* (Defendants made "no argument" sufficient to avoid waiver). That determination is correct.

Defendants contend that they raised "the exclusive New York forum selection clause argument" (1) in their briefing in opposition to Plaintiffs' motion for *status quo* order, (2) during the hearing on that motion, (3) in their Second Affirmative Defense, and (4) in the parties' Joint Pre-Trial Order. Br.20-21. But in each of those instances, Defendants were addressing a different issue: whether the claims in this case fall within the scope of the forum selection provision. Defendants did not address the distinct issue that the Court of Chancery found waived: whether, even if the forum selection provision would encompass the type of claims presented in this case, *Pohl* is bound by it given his undisputed status as a nonsignatory to the Credit Agreement.

In their briefing opposing a *status quo* order, for example, Defendants merely argued that "this litigation should take place in New York," with no mention of Pohl. A658-59. Similarly, during the *status quo* hearing, the parties and the court largely addressed whether the claims in this case fall within the scope of the forum selection provision. A1159-60, A1175-76, A1187. The only reference to Pohl regarding this issue was by *Pohl's* counsel, who argued that "the forum provision doesn't apply to Mr. Pohl, who is not a signatory to the credit agreement." A1159. Indeed, in GLAS and Pohl's reply brief supporting a *status quo* order, they likewise had specifically argued that "neither … Pohl and Ravindran … are parties to the Credit Agreement, and accordingly, they are not bound by its venue selection clause." A1133. Yet notwithstanding that the question of the provision's inapplicability to Pohl was expressly raised both in the reply brief and at the hearing, Defendants' counsel said nothing about it in response at the hearing. Similarly, as Defendants' quotations from their Second Affirmative Defense and the Joint Pre-Trial Order demonstrate, those sources address only whether the forum selection provision would encompass the claims in this case—not whether Pohl is bound by the provision as a nonsignatory.

In their pre-trial brief, GLAS and Pohl continued to argue, as they had during the *status quo* proceedings, that Pohl was not bound by the forum selection provision given his nonsignatory status. *See* A1458 ("[T]he forum provision … is inapplicable

to Pohl, who is not a party to the Credit Agreement."); A1461 ("Pohl … is neither a party to the Credit Agreement nor 'closely related' to the parties thereto—and, in particular, was not involved in the negotiation of the Credit Agreement. As such, Pohl is not bound by the contract's forum provision."); A1412 n.2 ("This provision does not bind … Pohl[.]").

By contrast, Defendants' pre-trial brief again said nothing about this issue. Defendants nevertheless now contend that, in their pre-trial brief, they "expressly noted … that Pohl had brought the action as a director of Byju's Alpha … and thus was not excluded from the applicability of the forum selection clause, which provides that *only* Agents or Lenders could bring certain limited actions outside of New York." Br.22 (citing A1510). That tortuous contention is meritless. For one, Defendants made their purported assertion only in a single sentence at the end of a footnote, and it is well-established that "a mere aside in a footnote [does] not fairly present [an] argument." *Lum v. State*, 101 A.3d 970, 971-72 (Del. 2014); *see also Bradley v. State*, 193 A.3d 734, 741 (Del. 2018); *Tumlinson v. Adv. Micro Devices, Inc.*, 106 A.3d 983, 988 (Del. 2013).

For another, to the extent one can divine a coherent argument from a passing remark in a footnote, Defendants grossly misrepresent what they asserted. Defendants were not arguing that the forum selection provision applies to Pohl despite his being a nonsignatory—the relevant issue. They were arguing that, unlike

GLAS, Pohl is *not* subject to the *last sentence* of the forum selection provision—a saving clause that allows any "Agent" or "Lender" to "bring any action or proceeding relating to this Agreement … in the courts of any jurisdiction," A208, and which GLAS and Pohl had invoked as one of the reasons why GLAS could bring this suit in Delaware. The question of whether Pohl could invoke that same saving clause does not address whether Pohl, as a nonsignatory, was bound in the first place by the provision's supposed requirement that all cases relating to the Credit Agreement be brought in New York (that is, the general limitation from which the saving clause was a carveout).

In short, at no point in *any* briefing below did Defendants argue that the forum selection provision applies to Pohl despite his nonsignatory status. Defendants are left to contend that they addressed this issue during trial. To begin with, however, Defendants were on notice of Pohl's argument about the forum selection provision's inapplicability to him, so their failure to brief the issue is dispositive: "Issues not briefed are deemed waived." *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999). Furthermore, Defendants' argument at trial regarding the forum selection provision was—consistent with its briefing—directed at the general question whether, "just under the words of the forum clause," this case must be heard in Delaware rather than New York. A1664. And even though Pohl's counsel once again argued that Pohl is "not a party to the credit agreement" and thus "not bound

by the forum selection clause," A1651—and extensively discussed that issue with the court, *see* A1651-59—Defendants' counsel strategically dodged that issue, telling the court, "I'm happy to address it, but I think you're already there, which is exactly right," A1677. Defendants' counsel then reiterated Defendants' exclusive focus on GLAS, contending: "[Pohl]'s not really a necessary party to this proceeding. They didn't really need to add him. This could have been brought by GLAS alone." A1677-78. Not only, then, did Defendants' counsel fail to grapple with the issue of whether nonsignatory Pohl was bound by the forum selection provision, but his "conscious, tactical decision[]" not to engage with the issue precludes error. *Ferguson v. State*, 642 A.2d 772, 780 (Del. 1994).

Finally, Defendants fault the absence of post-trial briefing, which they contend excuses their failure to address the issue in prior briefing. Br.23-25. But Defendants never specifically requested post-trial briefing, which the Court of Chancery is free to decline regardless (and Defendants claim no independent error from the absence of post-trial briefing). *See* A1732-33. Defendants' cited cases—all of which *find waiver*—merely, and properly, hold that a party who raises an issue pre-trial but fails to address it in post-trial briefing waives the issue. None supports the novel proposition that a lack of post-trial briefing lessens a party's prior obligation to properly raise and argue an issue beforehand—an obligation that Defendants did not satisfy here.

2. Alternatively, Any Error as to the Forum Selection Provision Was Not Plain.

Even if the Court of Chancery erred in finding that Defendants waived an argument that nonsignatory Pohl is bound by the forum selection provision, reversal is unwarranted because any error was not "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Lougheed*, 661 A.2d at 1060. That is so for two reasons. First, on the merits of the issue, the forum selection provision does not prevent either GLAS or Pohl from bringing this suit in Delaware. Second, given the clear and obvious Events of Default, the outcome of this case would not change if brought in New York.

a. Defendants argue that the forum selection provision applies to both GLAS and Pohl because "it is clear that [] the parties intended New York to be the proper venue for legal proceedings" relating to the Credit Agreement. Br.26. That "[c]asual" and "cursory" assertion is "insufficient to preserve the issue for appeal." *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004). Regardless, it is incorrect.

The forum selection provision allows GLAS to bring this suit in Delaware. The initial clause of the forum provision, on which Defendants solely rely, merely provides that the "parties hereto … submit[] … to the exclusive jurisdiction" of New York courts for an action or proceeding "arising out of or relating to this Agreement"—in other words, the parties are submitting to personal jurisdiction.

A207 (§10.9(c)). *See, e.g.*, *Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1132 (Del. Ch. 2008). The next clause of the provision addresses venue, and it states that claims regarding "such action or proceeding"—*i.e.*, one "arising out of or relating to this Agreement"—"*may*" be heard in New York courts, but any claims against GLAS or its related parties "*may only*" be heard in New York courts. A207-08 (§10.9(c)) (emphases added). In other words, GLAS *may*, but *need not*, bring claims "arising out of or relating to this Agreement" in New York courts, whereas Defendants bringing claims against GLAS or its related parties *may only*—that is, *must*—bring any such claims in New York courts. The last sentence of the provision—which states that "[n]othing in this Agreement … shall affect any right that any Agent or any Lender may otherwise have to bring any action or proceeding relating to this Agreement against any Loan Party … in the courts of any jurisdiction"—is a saving clause consistent with the preceding venue clause. *Id.*[3]

Read in whole, the provision thus makes clear that GLAS (as agent) and any Lender *may* bring a suit relating to the Credit Agreement in New York courts, but they are not required to do so, because they also have a "right … to bring" a suit

[3] The forum selection provision thus gives GLAS and the Lenders a tradeoff: they can bring suits relating to the Agreement against counterparties in the courts of any jurisdiction, but at the risk that the defendants are not subject to personal jurisdiction. If GLAS or the Lenders bring suit in New York courts, however, they are assured that the counterparties cannot challenge personal jurisdiction.

"relating to this Agreement against any Loan Party" in "the courts of any jurisdiction." This suit is clearly an "action … relating to th[e] Agreement against any Loan Party"; moreover, there is no question that, under §225, the Court of Chancery could decide whether the Loan Parties defaulted under the Agreement and GLAS could exercise remedies, since those issues "help[ed] the court decide the proper composition of [BYJU's Alpha's] board or management team." *Genger v. TR Invs., LLC*, 26 A.3d 180, 199 (Del. 2011). All told, then, GLAS can bring this suit in Delaware.

Even accepting Defendants' cramped view of the forum selection provision, under which the provision encompasses this case as a general matter, the provision would not apply to Pohl, because he was not a signatory to the Credit Agreement. New York law holds that "unless a recognized exception applies, … a forum selection clause may not be enforced against a nonsignatory." *Sherrod v. Mount Sinai St. Luke's*, 168 N.Y.S.3d 95, 100 (App. Div. 2022). Binding a since-appointed director to a corporation's earlier forum selection provision requires a predicate, fact-intensive finding that the director is "closely related" to a signatory. *See Freeford Ltd. v. Pendleton*, 857 N.Y.S.2d 62, 67 (App. Div. 2008); *L-3 Commc'ns Corp. v. Channel Techs., Inc.*, 737 N.Y.S.2d 366, 367 (App. Div. 2002). To find that Pohl is "closely related" to BYJU's Alpha, application of the forum selection provision "must have been foreseeable *prior to suit*, which implies that [Pohl] must

have been otherwise involved in the transaction in some matter[.]" *Out Publ'g, Inc. v. Lipo Liquidating Corp.*, 2013 WL 3661886, at *4 (N.Y. Sup. Ct. Jul. 1, 2013) (quoting *Recurrent Cap. Bridge Fund I, LLC v. ISR Sys. & Sensors Corp.*, 875 F.Supp.2d 297, 307-08 (S.D.N.Y. 2012)) (emphasis added). Defendants do not cite any New York law or attempt to satisfy any of these requirements. Nor could they, since Pohl was not "otherwise involved in" execution of the Credit Agreement; his involvement did not begin until well over a year into the Agreement.[4]

b. Finally, even if the forum selection provision required this suit to be brought in New York, the Court of Chancery's waiver determination does not rise to "plain error" requiring reversal because the ultimate outcome of this case would not change in a New York court. *See Indasu Int'l, C.A. v. Citibank, N.A.*, 861 F.2d 375, 380 (2d Cir. 1988) (party challenging improper forum after trial "must display substantial prejudice") (citing *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1168 (5th Cir. 1987), *reinstated*, 883 F.2d 17 (5th Cir. 1989)).

[4] Defendants state that "Pohl brought this action in his putative capacity as 'sole director' of" BYJU's Alpha. Br.26. That is factually incorrect—Pohl brought this suit in his individual capacity to confirm his disputed role as sole officer and director of BYJU's Alpha, *see* Compl. ¶37—and legally irrelevant, because it does not answer whether Pohl could be bound by the Credit Agreement under New York law.

Defendants' counsel argued during trial that "what would be appropriate is for this matter to be stayed so that a New York court can determine whether or not there's been a default. And then we can come back here and decide who should be the director." A1670. As an initial matter, that argument acknowledges that this suit *can* be brought in Delaware and that the forum selection provision does not bar this suit.

More significant, "whether or not there's been a default" is not a close question in this case. As set forth herein, there were *numerous* Events of Default—which the Loan Parties repeatedly *conceded* were Events of Default entitling GLAS to exercise remedies. And while Defendants have since ginned up *post hoc* defenses to those obvious Events of Default, they are patently meritless—as the Court of Chancery held below, this Court should hold on appeal, and any New York court would hold as well. Even assuming, therefore, that the Court of Chancery erred in finding waiver *and* that neither GLAS nor Pohl can bring this suit in Delaware, the Court of Chancery's decision was not "so clearly prejudicial to [Defendants'] substantial rights" to require reversal. *Lougheed*, 661 A.2d at 1060.

II. THE COURT OF CHANCERY CORRECTLY RULED THAT WHITEHAT'S FAILURE TO ACCEDE AS A GUARANTOR CONSTITUTED A MATERIAL BREACH OF THE CREDIT AGREEMENT ENTITLING THE LENDERS TO ENFORCEMENT.

A. Question Presented

Whether the Court of Chancery correctly determined that Whitehat's failure to accede as a guarantor materially breached the Credit Agreement, entitling GLAS and the Lenders to enforce remedies. A1427-49.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's interpretations of contractual language but will defer to its factual findings absent clear error. *See Gatz Props., LLC v. Auriga Cap. Corp.*, 59 A.3d 1206, 1212 (Del. 2012).

C. Merits of Argument

Defendants contend that Whitehat's failure to accede as a guarantor under the Credit Agreement does not justify enforcement of the Credit Agreement's remedies. Defendants offer three arguments in support of this proposition: (1) Section 5.9(c) "does not obligate the Loan Parties to obtain the accession of Whitehat"; (2) construing Section 5.9(c) as requiring Whitehat to accede as guarantor renders Section 5.17(d) superfluous; and (3) any breach was "trivial" and enforcement of remedies would be "unconscionable." Br.28-35. For the reasons set forth below, these assertions are meritless. But the Court need not even reach them, because the

Second, Third, and Seventh Amendments to the Credit Agreement foreclose Defendants' position at the outset.

1. The Credit Agreement's Amendments Repeatedly Acknowledge Material Breach and GLAS's Entitlement to Exercise Remedies.

The Second, Third, and Seventh Amendments to the Credit Agreement make clear beyond peradventure that Defendants conceded that Whitehat's failure to accede as a guarantor was a material breach permitting GLAS to enforce remedies. In the Second Amendment, the Loan Parties agreed that Whitehat's failure to accede as guarantor constituted a default under the Agreement (defined as a "Specified Default"). In the Third Amendment, the Loan Parties agreed that Whitehat's failure had not been cured (causing it to mature into an Event of Default), and that the Lenders were "therefore entitled" to exercise remedies through "notice of default and acceleration with respect to" that default. And in the Seventh Amendment, the Loan Parties (a) agreed that Whitehat's failure could not be cured unless the Lenders "specifically waived it"; (b) reiterated that the "Specified Defaults," including Whitehat's failure to accede, had "occurred"; and (c) reaffirmed that failure to cure Whitehat's failure "entitles" the Lenders to exercise remedies. *See* pp.8-9, *supra*. Indeed, the Court of Chancery found that the Seventh Amendment was "a contractual stipulation" that "Whitehat's failure to accede as a guarantor by

November 24" was an Event of Default giving "GLAS the right to send to BYJU's Alpha a default notice." Op.29.

Defendants ignore these amendments, but they are dispositive. The Amendments plainly state—indeed, "stipulat[e]"—that Whitehat's failure to accede as a guarantor was an Event of Default and that GLAS was therefore entitled to enforce remedies. And there is "no dispute" that, once GLAS was entitled to enforce remedies, it could take control of all of BYJU's Alpha's stock and, ultimately, appoint Pohl as sole director. Op.17. Accordingly, this Court need go no further to reject Defendants' position.

2. Under Section 5.9(c) of the Credit Agreement, BYJU's Alpha and T&L Unambiguously Covenanted that Whitehat Would Accede as Guarantor.

Regardless, Defendants' arguments are meritless on their own terms. Defendants first challenge a single statement by the Court of Chancery that, under the Credit Agreement, "each loan party covenants that Whitehat would accede as a guarantor on or before April 1, 2022." Op.22. Defendants construe this statement as a "finding" by the court that "the Loan Parties were obligated to obtain the Whitehat Guarantee." Br.28. That supposed "finding," they contend, is "irreconcilable" with Section 5.9(c) of the Credit Agreement—which provides that "Whitehat India shall accede … as a Guarantor"—because "Whitehat … is not a Loan Party." Br.28-29; A153 (§5.9(c)).

Defendants' argument conflicts with the Credit Agreement's plain language. Under New York law, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 170 (N.Y. 2002). Article V of the Agreement, entitled "Affirmative Covenants," contains a prelude stating that "each Loan Party covenants and agrees with the Lenders that:"—and it is followed by a list of obligations. A148. One of those obligations is Section 5.9(c), which provides in relevant part that "[o]n and from the earlier of April 1, 2022 and (ii) within five Business Days of the date RBI Approval is received, Whitehat India shall accede to this Agreement … as a Guarantor." A153 (§5.9(c)).

Read together, then, Article V's prelude and Section 5.9(c) provide that "each Loan Party covenants and agrees with the Lenders that … [o]n and from the earlier of (i) April 1, 2022 and (ii) within five Business Days of the date RBI Approval is received, Whitehat India shall accede to this Agreement … as a Guarantor." That is exactly what the Court of Chancery concluded: "each loan party covenants that Whitehat would accede as a guarantor on or before April 1, 2022." Op.22. To be sure, Section 5.9(c) refers only to Whitehat's obligation to accede as guarantor, and Whitehat itself is not a "loan party." But Defendants completely ignore Article V's prelude, under which the Loan Parties *themselves* (including BYJU's Alpha and T&L) promised that Whitehat would accede as a guarantor, just as the Court of

Chancery concluded. *See also, e.g.*, *Brad H. v. City of New York*, 951 N.E.2d 743, 746 (N.Y. 2011) (explaining that contractual language "should not be read in isolation because the contract must be considered as a whole").

The parties thus allocated the risk to the Loan Parties to ensure that Whitehat acceded as a guarantor on or before April 1, 2022. That allocation made perfect sense since Whitehat is a subsidiary of T&L. If Whitehat did not accede as a guarantor on or before April 1, 2022, T&L (and BYJU's Alpha) would be on the hook for breaching the "covenant[]" to which it agreed in Article V. And that "fail[ure] to observe or perform" the "covenant" by T&L, if uncured, would constitute an "Event of Default" entitling GLAS to enforce remedies. A180 (§8.1(e)). As the Court of Chancery observed—and Defendants do not dispute—"the fact that breach of that covenant is the result of a nonparty's action or inaction … does not affect its validity or the consequences of its breach." Op.22-23. That is the agreement to which T&L and its subsidiary—sophisticated, well-represented parties—agreed, and they are bound to it.

3. The Court of Chancery's Interpretation Properly Gives Meaning to Both Section 5.9(c) and Section 5.17(d).

Defendants next contend that Section 5.17(d) of the Credit Agreement would be rendered "superfluous" if, under Section 5.9(c), the Loan Parties covenanted that Whitehat would accede as a guarantor on or before April 1, 2022. Br.30. Defendants are incorrect.

Section 5.9(c) of the Credit Agreement provides that "[o]n and from the earlier of (i) April 1, 2022 and (ii) within five Business Days of the date RBI Approval is received, Whitehat India shall accede to this Agreement … as a Guarantor." A153 (§5.9(c)). Section 5.17(d) provides that T&L must "use its reasonable commercial efforts to procure the RBI Approval on or prior to April 1, 2022 in order that it and Whitehat India may guarantee the Covered Obligations." A157 (§5.17(d)). Section 5.17(d) also provides that, while T&L was procuring Whitehat India's guarantee, the "failure to obtain the RBI approval prior to April 1, 2022 … shall not cause a breach." A157 (§5.17(d)).

As the Court of Chancery explained, Section 5.9(c)'s "April 1 deadline is not conditioned on the receipt of RBI approval." It "is a hard deadline if RBI approval is not obtained beforehand." Op.22. Section 5.17(d) then "works in tandem with" Section 5.9(c) by requiring T&L to use "reasonable commercial efforts to procure" RBI approval by the April 1 deadline while making clear there is no penalty to T&L for failure to obtain RBI approval prior to April 1. Op.25. But if April 1 arrives and Whitehat has not acceded as a guarantor—for whatever reason—Section 5.9(c) has been breached. In short, as the court explained, Section 5.17(d) "addresses the effort [T&L] must put in to cause Whitehat to accede as a guarantor." Op.26. This "efforts clause" does "not change, weaken, or nullify the fact that the loan parties covenanted

that Whitehat would, in fact, accede and accept the consequences if it did not." Op.26.

Nothing about this sensible reading of the Credit Agreement renders Section 5.17(d) a "nullity." Br.30. Defendants thus seize upon a single remark by the Court of Chancery that Section 5.17(d) "governs prior to April 1 or the date RBI approval is granted, while Section 5.9(c) governs only on April 1, or after RBI approval is obtained." Op.25-26. Defendants contend that "if … the Loan Parties were expressly obligated to obtain the Whitehat Guarantee on April 1, 2022, then providing that they only need to utilize reasonable commercial efforts to obtain RBI approval *prior* to April 1, 2022, would be redundant, as there was at that time no obligation to obtain the Whitehat Guarantee." Br.31. But the Loan Parties were not "obligated to obtain the Whitehat Guarantee on April 1," and the Court of Chancery did not say this. By observing that Section 5.9(c) "governs only on April 1," the court was simply referring to April 1 being the hard deadline for Whitehat to accede as guarantor. As the court elsewhere clearly explained, Section 5.9(c) required Whitehat to accede as guarantor "on or before April 1." Op.22.

Continuing their myopic focus on a single, isolated remark, Defendants contend that it renders two words in Section 5.17(d) superfluous because the "reasonable commercial efforts" requirement runs through April 1, "not just the time leading up to it." Br.31. Defendants' nitpicking is misguided. The court used a

construct to describe how Sections 5.9(c) and 5.17(d) work together. The court's reference to Section 5.17(d) governing "prior to April 1" correctly reflected that Section 5.17(d) pertains to actions generally preceding the April 1 deadline (such as T&L's reasonable commercial efforts), while Section 5.9(c) pertains to actions as of April 1 (the deadline for Whitehat's acceding as guarantor). The fact that Section 5.17(d)'s "reasonable commercial efforts" requirement happens to run through April 1, and not simply up to April 1, does not detract from the Court of Chancery's operative point, which is that the two provisions readily work in "tandem" with each other under the most sensible interpretation of the Credit Agreement consistent with its plain language.

Finally, the Court of Chancery also explained that Section 5.17(b) "reinforces" the conclusion "that Whitehat's failure to accede gives rise to a default in certain circumstances." Op.26-27. Section 5.17(b) provides that Whitehat's failure to accede as a guarantor by April 1 does *not* trigger a default "if the guarantee maintenance amount … and other conditions are met." Op.27; A157 (§5.17(b)). This provision "would not be necessary if Whitehat's failure to accede never created a default in the first instance." Op.27. That logic also extends to Section 3.3, by which Defendants acknowledged that a condition to satisfying their obligations was the "receipt of the RBI Approval for … Whitehat India to issue a guarantee … prior

to 1 April 2022." A138 (§3.3). Defendants do not address the court's Section 5.17(b) reasoning and cannot credibly reconcile Section 3.3 with their position.

4. Defendants' Breaches Were Material, and Enforcing the Credit Agreement's Remedies Is Not Unconscionable.

Defendants last argue that any breach regarding Whitehat's guarantee was "trivial," so, under "equitable principles," allowing GLAS to exercise remedies would be "unconscionable." Br.31-32. As with Defendants' other arguments, this contention fails at the outset given Defendants' concessions in the Credit Agreement's amendments that the Specified Defaults—including Whitehat's failure to accede as guarantor—entitled the Lenders to exercise contractual remedies. *See* pp.25-26, *supra*.

Regardless, Defendants' argument lacks merit. New York law allows loan parties "to include provisions directing what will happen in the event of default." *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 44 (2d Cir. 2012). Accordingly, "[a]cceleration clauses"—a "quite common" default remedy—and other contractual remedies "are generally enforced according to their terms." *Key Int'l Mfg. Inc. v. Stillman*, 480 N.Y.S.2d 528, 530 (App. Div. 1984). In particular, "[w]hen sophisticated parties enter into a contract, the contract should be enforced according to its terms." *301 E. 60th St. LLC v. Competitive Sols. LLC*, 190 N.Y.S.3d 327, 331 (App. Div. 2023); *see also Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*, 660 N.E.2d 415, 421 (N.Y. 1995) ("Freedom of contract prevails in

an arm's length transaction between sophisticated parties[.]"). At most, some New York courts have suggested that "unconscionable overreaching *may* be found in situations where there was a good faith mistake, *promptly cured by the party in default* with no prejudice to the creditor." *Chiampou Travis Besaw & Kershner, LLP v. Pullano*, 148 N.Y.S.3d 783, 786 (App. Div. 2021) (first emphasis added).

Quite simply, "[t]his is not one of those 'rare cases'" where the parties' agreed-upon terms should be disregarded. *Key Int'l*, 480 N.Y.S.2d at 530. This case does not involve a "good faith mistake, promptly cured" by an unsophisticated party resulting in "no prejudice" to the Lenders. Quite the opposite: Whitehat's failure to accede as a guarantor denies the Lenders recourse to the assets of Whitehat (recently purchased by T&L for $300 million), and that significant breach remains uncured despite "repeated forbearance" by the "patient" Lenders. Op.37.

Citing *Tunnell Publishing Co. v. Straus Communications, Inc.*, 565 N.Y.S.2d 572, 575 (App. Div. 1991), and *In re 53 Stanhope LLC*, 625 B.R. 573, 586 (Bankr. S.D.N.Y. 2021), Defendants maintain that absent "damages" or security impairment, "acceleration for a non-monetary default is unconscionable." Br.32-34. Neither case supports that sweeping proposition, which, if adopted, would upend numerous carefully-structured lending arrangements. Courts applying New York law routinely hold that parties may agree to treat non-payment-related defaults as material, including when default results in acceleration. *See, e.g., JMD Holding Corp. v.*

Congress Fin. Corp., 828 N.E.2d 604, 612 (N.Y. 2005) (holding that breaches of covenants enabling lenders "to track the movement and quality of [their] collateral" are "material"); *Gaia House Mezz LLC v. State Street Bank & Tr. Co.*, 720 F.3d 84, 94 (2d Cir. 2013) (holding that defaults that parties "expressly agreed to designate … as material" cannot be "trivial or technical breaches" precluding acceleration).

Both cases are also distinguishable. In *Tunnell*, the lender accelerated after the counterparty had reassigned its debt to a "substantially similar entity" in its corporate family, and even though the new debtor continued to satisfy its predecessor's obligations and the lenders "continued to do business" with it "without reservation." 565 N.Y.S.2d at 574-75. *In re 53 Stanhope LLC* addressed "creditor misconduct" when considering postpetition interest under 11 U.S.C. §506(b), and the handful of defaults that the bankruptcy court concluded would be unenforceable under New York law were both truly marginal *and* cured (*e.g.*, building code violations). 625 B.R. at 582, 586. These circumstances are far removed from the facts here, where the admittedly uncured failure of Whitehat—a $300 million company—to accede as guarantor deprived the Lenders recourse to Whitehat's assets in the event of default.

III. THE COURT OF CHANCERY CORRECTLY REJECTED DEFENDANTS' IMPOSSIBILITY DEFENSE TO WHITEHAT'S FAILURE TO ACCEDE AS GUARANTOR.

A. Question Presented

Whether the Court of Chancery correctly rejected Defendants' impossibility defense to Whitehat's failure to accede as a guarantor. A1450-56.

B. Scope of Review

The Court reviews this legal question *de novo*, but defers to any underlying factual findings by the Court of Chancery absent clear error. *See Coster v. UIP Cos., Inc.*, 300 A.3d 656, 663-64 (Del. 2023).

C. Merits of Argument

The Court of Chancery correctly held that the default occasioned by Whitehat's failure to accede as a guarantor is not excused due to impossibility. As an initial matter, Defendants' impossibility defense is foreclosed by their agreeing in the Amendments to treat the Whitehat default as a Specified Default even *after* the RBI denied Whitehat's guarantee application. *See* pp.8-9, 25-26, *supra*.

Regardless, under New York law, "[i]mpossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible." *Kel Kim Corp. v. Cen. Mkts., Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987). Furthermore, "the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract." *Id.* The impossibility doctrine provides

that "performance of a contract will be excused if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable." *A & S Transp. Co. v. Cnty. of Nassau*, 546 N.Y.S.2d 109, 111-12 (App. Div. 1989). It does not apply to risks "contemplated by the contract," even if the "precise causes" of the risk "were not specified." *Gen. Elec. Co. v. Metals Res. Grp. Ltd.*, 741 N.Y.S.2d 218, 220 (App. Div. 2002).

The impossibility doctrine is "rarely imposed," *Lagarenne v. Ingber*, 710 N.Y.S.2d 425, 428 (App. Div. 2000), and "applied narrowly," because "the purpose of contract law is to allocate the risks that might affect performance," and "that performance should be excused only in extreme circumstances," *Kel Kim*, 519 N.E.2d at 296. The doctrine is especially inapposite where the parties are "sophisticated," *Pleasant Hill Developers, Inc. v. Foxwood Enterprises, LLC*, 885 N.Y.S.2d 531, 534 (App. Div. 2009), or where "seasoned attorneys" prepared the contract, *Lagarenne*, 710 N.Y.S.2d at 428.

This case does not present the "extreme circumstances" that warrant application of the "rarely imposed" impossibility doctrine. When the parties executed the Credit Agreement on November 24, 2021, Indian regulations required Whitehat to obtain RBI approval for a foreign guarantee under both the "Amount" and "Net Worth" tests, but Whitehat could invoke the "Borrowing Exception" to satisfy the "Net Worth Test," under which it could rely on its parent's net worth.

Op.32; A1385. Three months earlier, however, the RBI had published proposed revisions to those regulations that did *not* maintain the Borrowing Exception. Op.32; A1369, A1372. And sure enough, when the final regulations were enacted on August 22, 2022—after the Credit Agreement's execution—the Borrowing Exception was not maintained. Op.32.

Given that the proposed revised regulations published before the Credit Agreement's execution did not include the Borrowing Exception, it was readily foreseeable that the RBI might eliminate the exception in the final revised regulations—as it ultimately did. Yet the parties "expressly allocated the risk that RBI approval could not be obtained to" the Loan Parties "by imposing an April 1 drop-dead date for Whitehat to accede as a guarantor, regardless of RBI approval." Op.34. BYJU's Alpha and T&L "could have guarded against a default based on failure to get approval for Whitehat, but they did not." Op.34. Instead, Defendants accepted terms that allocated to them all the risk associated with RBI non-approval by April 1, 2022, regardless of why—*e.g.*, a change in law, RBI disapproval on other grounds, or simply bureaucratic delay. *See Gen. Elec. Co.*, 741 N.Y.S.2d at 220; *see also Four Asteria Realty v. BCP Bank of N. Am.*, 897 N.Y.S.2d 487, 488 (App. Div. 2010) (rejecting impossibility where contract "contemplated the risk of … failure to obtain the necessary governmental approval"). Moreover, once the risk of non-approval materialized into a certainty on April 1, 2022, Defendants nevertheless

negotiated a series of amendments acknowledging that the Whitehat default occurred and confirming the Lenders' rights to deliver a Default Notice in response—all without even hinting at an impossibility defense.

Faced with a steep uphill climb on both the law and the facts, Defendants pick away at the margins. *First*, Defendants take issue with the Court of Chancery's observation that they "offered no evidence" that elimination of the Borrowing Exception "was unforeseeable and could not have been guarded against." Op.35. Defendants claim that they "*did* offer evidence that the changes to the Borrower exception were unforeseeable." Br.37 (emphasis added). But Defendants' only "evidence" is just argument—specifically, that "the discontinuation of the 'borrowing' exception was never stated" before the new regulations were issued. Br.38.

As GLAS and Pohl's Indian law expert explained, however, and Defendants have never disputed, the proposed regulations conspicuously *omitted* the Borrowing Exception. Specifically, they eliminated "Explanation 4 to Regulation 6(3)" in the existing regulations, which is what established the Borrowing Exception. A1372 (emphasis omitted). And because "Explanation 4" had always been "an exception to the general rule that a subsidiary of an Indian entity … had to independently satisfy the Net Worth Test from its own net worth," it would have been "understood" from the exception's absence from the proposed regulations—and from the absence

of "a specific and affirmative statement" in the proposed regulations providing that a subsidiary could still utilize its parent's net worth—that the proposed regulations no longer allowed using a parent's net worth. A1383 (emphases omitted).

Under those circumstances, it was readily foreseeable, especially by sophisticated parties organized under Indian law and subject to RBI governance, that RBI's final regulations would eliminate the Borrowing Exception, just as the proposed regulations indicated would occur—even if the regulations did not "explicitly state[]" that the Borrowing Exception was proposed to be eliminated. Br.38. Regardless, absent any evidence tying the RBI's rejection of Whitehat's application to unique scrutiny stemming from the Net Worth test, Defendants can only speculate about the cause of their default. Either way, Defendants could have easily guarded against the possibility of RBI not approving Whitehat's guarantee by April 1, whatever the reason, by accommodating it in the Credit Agreement, but they chose not to. *See Pleasant Hill*, 885 N.Y.S.2d at 534 (holding that "sophisticated developers" failed to establish that they "could not have foreseen or guarded against the possibility that the Town would amend its zoning regulations in a manner which prohibited a six-lot subdivision of the property"); *A & S Transp.*, 546 N.Y.S.2d at 112 ("[A]ctions by the EPA to restrict sludge discharge rates had already been taken

prior to the submission of bids, so that A&S cannot claim that the governmentally imposed decreased rates … were 'unforeseeable.'").[5]

Second, Defendants challenge the Court of Chancery's reliance on *Red Tree Investments, LLC v. Petróleos de Venezuela, S.A.*, 2021 WL 6092462 (S.D.N.Y. Dec. 22, 2021), *aff'd*, 82 F.4th 161 (2d Cir. 2023), *see* Br.39-40, but that argument does not move the needle. In *Red Tree*, the district court, applying New York law, held that an executive order imposing sanctions on certain Venezuelan-related entities issued two weeks before contracting parties entered into an agreement made a future expansion of those sanctions to include a state-owned business reasonably foreseeable. 2021 WL 6092462, at *6-7. The court thus found that the parties could have guarded against the risk of future sanctions in the contract, defeating an impossibility defense. *Id.* So too here: Based on proposed regulations that omitted the Borrowing Exception, it was reasonably foreseeable that RBI could adopt final regulations omitting the exception, so Defendants faced a material risk to future performance against which they could have guarded during contracting—but they did not, either in the Credit Agreement or subsequent Amendments.

[5] Defendants also argue that nobody knew "when or even if" the proposed regulations "would be adopted as law." Br.38. None of that affects whether the changes in the regulations were foreseeable.

Defendants also object to the Court of Chancery's invocation of Williston's observation that "changes in law are generally foreseeable," contending that there are New York cases concluding that "contracting parties' performance can be excused as a result of governmental activities." Br.40. But that is why Williston says that changes in law are "*generally*" foreseeable—occasionally, they are not, as in the lone case that Defendants cite, *Campo v. Board of Education*, *Brookhaven-Comsewogue Union Free School District*, 622 N.Y.S.2d 66 (App. Div. 1995), where a municipality unexpectedly changed a property's zoning classification after a contract was signed. *Id.* at 67. *Campo* bears no resemblance to the facts here, where the RBI previewed eliminating the Borrowing Exception several months before the Credit Agreement's execution.

Third, Defendants contend that the parties "did allocate the risk of not obtaining the Whitehat Guarantee." Br.41. But Defendants' argument relies on its mistaken interpretation that T&L and BYJU's Alpha did not covenant that Whitehat would accede as guarantor, and only promised to use "reasonable commercial efforts." As explained, that argument lacks merit. *See* pp.28-32, *supra*. Defendants have no independent argument that they allocated the risk to the Lenders in light of the foreseeable elimination of the Borrowing Exception after the Credit Agreement's execution. Nor, for that matter, do they have any answer for the fact that, *even after* the Borrowing Exception was officially eliminated on August 22, 2022—at which

point "the risk shifted from foreseeable to known," Op.35—the Second Amendment (dated October 12, 2022) *still* allocated the risk to the Loan Parties of Whitehat's failure to accede as a guarantor. By any measure, Defendants have not demonstrated the "extreme circumstances" that warrant application of the impossibility doctrine. *Kel Kim*, 519 N.E.2d at 296.

IV. THE JUDGMENT CAN BE AFFIRMED BASED ON DEFENDANTS' OTHER DEFAULTS.

A. Question Presented

Whether, even if the Court of Chancery erred regarding the Whitehat default, this Court should nevertheless affirm given Defendants' other conceded defaults. A1427-34.

B. Scope of Review

This Court "may affirm on the basis of a different rationale than that which was articulated by the trial court." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

C. Merits of Argument

Even if the Court of Chancery erred regarding the Whitehat default, affirmance is still warranted based on any of the three other defaults stemming from T&L's failure to provide financial reports as required under the Credit Agreement. *See* pp.7-9, *supra*. Under the Second, Third, and Seventh Amendments, the Loan Parties agreed that these financial reporting defaults were Specified Defaults that matured into Events of Default entitling GLAS to exercise remedies. Op.12-13; B146, B151, B156, B161 (Recitals, §§3(b)(ii), 5(h), 8(d)). Moreover, Defendants have never disputed that these defaults occurred nor offered any plausible basis to disregard them.

Defendants have variously invoked duress, immateriality, unconscionability, and unclean hands defenses, *see* A1499, A1512-19, A1521-24, but these arguments were, and remain, plainly wrong. First, New York law does not recognize "actionable duress" where, as here, "the alleged menace was [a threat] to exercise" contractual remedies. *ECI Fin. Corp. v. Resurrection Temple of Our Lord, Inc.*, 184 N.Y.S.3d 96, 98 (App. Div. 2023). Second, New York law treats breaches of reporting covenants as "material," not "minor recordkeeping deficiencies." *JMD*, 828 N.E.2d at 612. Third, any unclean hands defense fails given the many times the "patient" Lenders agreed to forbear remedies despite their conceded right to proceed. Op.37. The Lenders gave the Loan Parties more than enough opportunities to rectify problems of the Loan Parties' own making. Eventually, however, the Lenders concluded that enough is enough. This Court should do the same, affirm the judgment below, and bring this corporate control battle to an end.

CONCLUSION

The Court should affirm the Court of Chancery's judgment.

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